Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Melanie Paquet et al.,

complainants,

and

Air Canada,

respondent,

Board File: 28180-C
Neutral Citation: 2013 CIRB **691**
July 4, 2013

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, sitting alone pursuant to section 156(1) of the *Canada Labour Code (Part II Occupational Health and Safety)* (*Code*). A hearing was held on May 16–18, 2012, November 29–30, 2012, and March 12–13 and 15, 2013.

Appearances

Mr. James Robbins, for Ms. Melanie Paquet et al.; and

Ms. Maryse Tremblay, for Air Canada.

I–Introduction

[1] In recent years, Air Canada and employees represented by the Canadian Union of Public Employees (CUPE) have had numerous differences of opinion over the proper interpretation of Part II of the *Code*. Despite their disagreements, Air Canada and the employees' representative, CUPE, have attempted, through both consensual third-party processes, as well as through collective agreement negotiations, to arrive at a working understanding of Air Canada's and its employees' *Code* obligations.

[2] In this case, three separate incidents gave rise to employee complaints.

[3] In March, 2010, Air Canada issued letters to the three employee members on the statutorily-required health and safety Policy Committee (PC): Ms. Melanie Paquet, the PC co-chair, Ms. Julie Pelletier and Ms. Silvana DeSantis. Air Canada alleged that the employees had refused to go through with a PC meeting, despite being on full time paid leave from Air Canada to perform PC duties.

[4] CUPE, which filed the complaint as the employees' designate, argued that Air Canada's letters constituted prohibited reprisals, since the employee members on the PC were simply insisting on the respect of their *Code* rights.

[5] In April, 2010, Air Canada issued two more letters, one to Ms. Paquet and an identical one to Ms. DeSantis, concerning an April PC meeting, which was designed to make up for the one which had not occurred in March. Ms. Pelletier was scheduled to be absent from that PC meeting and thus did not receive a letter. CUPE argued that the letters resulted directly from Ms. Paquet's and Ms. DeSantis' continued insistence on the respect of their *Code* rights.

[6] The final incident concerned Ms. Pelletier's June, 2010 request for union leave under the collective agreement. CUPE alleged Air Canada unnecessarily delayed the processing of the leave request because of her ongoing role on the PC. Air Canada alleged this third incident should be decided by an arbitrator under the collective agreement and relied on an earlier Board decision in this case which had deferred certain matters to arbitration.

[7] The Board has decided to dismiss the employees' complaints for the reasons which follow. While the employees are the parties to this Part II complaint for the reasons recently set out in *Isinger*, 2013 CIRB 688 (*Isinger 688*), the Board may, for ease of reference, sometimes refer to CUPE, since it acted throughout as the employees' representative.

II–Chronology of Key Events

A–Background

[8] Air Canada and CUPE have attempted in recent years to resolve certain interpretation issues arising under Part II of the *Code*. In an earlier decision in this case, *Air Canada*, 2011 CIRB 599 (*AC 599*), which dealt with three preliminary objections raised by Air Canada, the Board summarized its past decisions:

> [10] Air Canada and CUPE have been involved in a significant amount of litigation over the years with regard to Occupational Health and Safety (OHS) matters under Part II of the *Code*. Those issues have involved various adjudicative bodies including this Board and Health and Safety Officers (HSO), as well as judicial reviews to the Federal Court of Canada.
>
> A-*Air Canada*, 2006 CIRB 358
>
> [11] In *Air Canada*, 2006 CIRB 358 (*Air Canada 358*), the Board considered, *inter alia*, the remuneration of flight attendants for Health and Safety Committee work under the *Code*.
>
> [12] In *Air Canada 358*, the Board determined, *inter alia*, the appropriate remuneration for flight attendants performing these Part II duties. CUPE filed an application for reconsideration on September 6, 2006.
>
> B-*Air Canada*, 2007 CIRB 394
>
> [13] A reconsideration panel in *Air Canada*, 2007 CIRB 394 (*Air Canada 394*), overturned *Air Canada 358* and found that Part II of the *Code* did not give the Board jurisdiction to establish something such as the appropriate remuneration for Part II work. Those types of questions went beyond the Board's Part II jurisdiction which was limited to employee reprisal complaints.

[9] *AC 599* also summarized a consensual process that Air Canada and CUPE had negotiated in order to assist with issues arising from Part II of the *Code*. As described in *AC 599*, they negotiated a "Framework Med-Arb Agreement" (Ex-1; Tab 1) and asked arbitrator Michel Picher to assist them. That process is still ongoing:

> [15] On December 12, 2008, CUPE filed a different Part II complaint with the Board (file no. 27225-C). At the parties' request, the Vice-Chairperson hearing the case mediated the complaint in order to explore whether there might be another mechanism to assist the parties in resolving their long-standing differences over the application of Part II of the *Code*.
>
> [16] The parties negotiated a "Framework Med-Arb Agreement" (Framework Agreement) which sent their various disputes to a mediator-arbitrator. The parties appointed Mr. Michel Picher to act as mediator-arbitrator.
>
> [17] Under the Framework Agreement, both CUPE and Air Canada submitted issues to the mediator-arbitrator including, but not limited to, an issue proposed by Air Canada: "to whom are employees released pursuant to section 135.1(10) accountable?"

[10] On June 22, 2009, Air Canada and CUPE also negotiated a Memorandum of Agreement (MOA) (Ex-1; Tab 2), portions of which referred to the topics of full time releases, backfilling and access to arbitration:

> A new MOA shall be entered into:
>
> Memorandum of Agreement
> (the "Agreement")
> BETWEEN:
> Canadian Union of Public Employees, Airline Division,
> Air Canada Component
> (the "Union")
> -and-
> Air Canada
> (the "Company")
>
> Re: Company-Paid Health and Safety Flight Releases
>
> Whereas the Union filed the Payment of Wages grievance (CHQ-08-42) with respect to pay for Health and Safety Representatives,
>
> And whereas the parties wish to resolve that grievance,
>
> The parties therefore agree as follows:
>
> Number of Health and Safety Flight Releases

The Company will bear the cost of the following number of full-time released cabin personnel to perform work as employee Health and Safety Representatives under Part II, of the *Canada Labour Code* ("*Code*"):

In-flight Service Policy Health and Safety Committee: 3 FTRs

YVR Work Place Health and Safety Committee: 2 FTRs

YYC Work Place Health and Safety Committee: 1 FTE

YYZ Work Place Health and Safety Committee: 3 FTRs

YUL Work Place Health and Safety Committee: 2 FTRs

The employee Health and Safety Representatives shall perform the work prescribed by the *Code* and otherwise to further Air Canada and its employees' direct joint best interests.

There shall be no additional releases of cabin personnel to backfill employee Health and Safety Representatives absent for any reason. Additional employee Health and Safety Representatives may be released on an ad hoc basis solely for the purpose of reporting to a work refusal investigation or other functions assigned pursuant to section 135.1(8) of the *Code* that occur or must be performed outside the regular working hours of the full-time employee representatives. Additional representatives so released shall be paid in accordance with this Agreement.

...

Status of This Memorandum of Agreement

This Agreement may be modified by agreement of the parties or, with the exception of the Payment of Wages Grievance (CHQ-08-42) settlement provision and all sections herein related to payment of wages (collectively, "Payment of Wages"), as a result of the determinations of the Mediator-Arbitrator under the Framework Med-Arb Agreement of April 21, 2009. This Agreement shall be without prejudice to the positions the parties may take on any issue, except Payment of Wages, before the Mediator-Arbitrator in that process. However, this Memorandum of Agreement can be produced during the Mediation-Arbitrator process if requested by the Mediator-Arbitrator.

The parties agree that this Memorandum of Agreement is enforceable through the grievance arbitration procedure of the Collective Agreement. This Memorandum of Agreement shall last the duration of the Collective Agreement (July 1, 2009 to March 30, 2011), unless modified by the Mediator-Arbitrator or by agreement of the parties. For greater certainty, this Agreement shall, with the exception of the provisions related to Payment of Wages and any determination made by the Mediator-Arbitrator, expire with the Collective Agreement and shall continue into any future Collective Agreement only if so negotiated.

(emphasis added)

[11] It is against this backdrop that the events described in the complaint occurred in March, April and June, 2010.

B–March 2010 Events

[12] The employer and employee members of the PC had originally agreed to meet on March 25–26, 2010. Ms. Paquet, the employee co-chair, had been scheduled to lead the March PC meeting.

[13] Email discussions then occurred about possible alternative dates for the PC meeting, due to the probable absence of Air Canada's Ms. Julie-Anne Lambert, the employer co-chair.

[14] A difference developed over scheduling and who could attend the PC meeting. For example, in a March 11, 2010 email to Ms. Paquet (Ex-1; Tab 7), Ms. Isabelle Jourdain, an Air Canada PC member, suggested keeping the previously agreed to dates:

> Bonjour,
>
> As we are not unable [sic] to schedule any consecutive days until June, we suggest keeping the original dates (Thursday 25 & Friday 26) for the PC meeting.
>
> However, Julie-Anne will not be available on the 25th. Therefore, I recommend that we cover the old issues from our categorized list and provide update on our projects on the first day and cover the remaining items on the second day.
>
> Mélanie, will you be putting together the agenda or would you like me to draft one?
>
> Regards,
>
> Isabelle

[15] In her March 15, 2010 email response, Ms. Paquet agreed to keep the original dates, and took the position that certain other CUPE members were also on the PC:

> Bonjour Isabelle,
>
> I agree to hold the meeting on the initial agreed dates, March 25th and 26th.
>
> **As you know, it is our position that Karen Allbright [*sic*] and Bernadette Jean are employee members of the PC committee.**
>
> **Therefore, I wish for them to attend the next Policy committee meeting.**

I will be putting together the agenda as per your proposition due to Julie-Anne's absence on the 25th. Will you be the alternate co-chairperson for that meeting?

Regards,

Melanie

(emphasis added)

[16] Ms. Jourdain disagreed, as evidenced by her March 16, 2010 email to Ms. Paquet, and took the position that the MOA only released three cabin personnel for the PC, i.e. Ms. Paquet, Ms. Pelletier and Ms. DeSantis:

Bonjour Melanie,

I'm responding on behalf of the Employer co-chair.

Bernadette Jean and Karen Allbright are already released full-time, at CUPE's request, to be representatives on work place committees.

Under the MOA, they are supposed to work their 35 hours for the committees for which they were released.

Bernadette and Karen are not released to attend PC meetings, work on PC issues and/or receive PC correspondence. Under the June 22 MOA, the company must release three cabin personnel full-time for the Policy Committee. CUPE appointed you, Silvana and Julie as those representatives and there is no right to have anyone else released.

We respectfully deny your request.

I will be acting co-chair on the 25th.

Can you please send us the agenda by tomorrow?

Please advise if Stacey can join us as an observer.

Regards,

Isabelle

(emphasis added)

[17] Ms. Paquet, in her email response, agreed to hold the PC meeting on a without prejudice basis. However, in response to Air Canada's request to have Ms. Stacey-Cymone Aqui attend as an observer, CUPE agreed, but on the condition that Mr. Richard Balnis attend as a CUPE observer:

Bonjour Isabelle,

We will be holding the meeting, once again, without prejudice.

I will be sending the agenda shortly.

In reference to you [*sic*] request to have Stacey attend as an observer, I would be willing to accept, if you as the alternate employer co-chair, would accept that the employee members also invite an observer namely Richard Balnis.

Regards,

Melanie

[18] This ongoing difference of opinion also included the issue of whether Air Canada could have an alternate at the PC meeting. On March 23, 2010, Air Canada's co-chair, Ms. Lambert, advised Ms. Paquet by email (Ex-1; Tab 9) that Ms. Aqui would attend the meeting as her alternate:

Please note that I will not be able to attend this week's PC meeting. **Stacey, who is appointed as an employer alternate, will be attending on my behalf; however Isabelle will be the acting co-chair.**

For the Safe Park conference call on Friday, I will try to attend with Silvana, and Stacey will step out of the PC meeting during that time so that we do not have more employer members at the meeting.

Regards,

Julie-Anne

(emphasis added)

[19] On March 24, 2010, Ms. Paquet and Ms. Lambert continued to exchange emails on the issue of alternates. Ms. Lambert put forward Air Canada's interpretation of the MOA:

Allo [*sic*] Melanie,

The CLC, article 135.1(6) states that an employer may select alternate members to serve as replacements. Normally employee members can do so as well except that your union signed a MOA that states "There shall be no additional releases of cabin personnel to backfill employee Health and Safety representatives absent for any reason".

Julie

(emphasis added)

[20] The Board heard evidence from those in attendance at the PC meeting on March 24, 2010. The dispute regarding the right to have an alternate attend continued. Ultimately, the meeting did not proceed.

[21] While there was some dispute during oral evidence about who actually walked out of the meeting, counsel for CUPE was forthright in stating that no meeting would have occurred that day as long as Air Canada maintained its position on alternates.

[22] The employees and Air Canada attempted to reschedule the PC meeting. For example, after receiving a list of the employee's available dates, Ms. Jourdain emailed Ms. Paquette on March 29, 2010, and suggested rescheduling to April 26–27, 2010 (Ex-1; Tab 12). Ms. Jourdain also mentioned that Ms. Lambert would again not be available to attend that meeting.

[23] On March 29, 2010, Ms. Lambert wrote (Ex-13) to Mr. Anup Anand, the Director, In-Flight Service Cabin Crew Bases–Eastern Canada, about a letter:

> Anup,
>
> **Can you send the letter to the 3 PC girls ASAP? Isabelle have [*sic*] already told them my agenda is full so the problems will start.**
>
> Thanks,
>
> Julie
>
> (emphasis added)

[24] On March 30, 2010, Mr. Anand issued three identical letters (Ex-1; Tabs 13–15), characterized as "letters of expectation" by Air Canada, to Ms. Paquette, Ms. Pelletier and Ms. DeSantis concerning the aborted March 25, 2010 PC meeting:

> ...
>
> I understand that you refused to take part in a policy committee meeting last week in Montreal because you did not recognize an employer representative's alternate. I have reviewed the minutes that you drafted, which state:

"The Employee Co-Chair stated that we do not agree on holding the meeting with Stacey participating today, as a fourth employer member of the PC. Furthermore, her presence had not been agreed to. She suggested the meeting takes place, without Stacey, and as originally planned, as there is a lot of work to cover. The employer alternate co-chair refused.

Employee co-chairperson then suggested postponing the meeting to a later date when all committee members could attend."

[employee name], **you are expected to participate in PC meetings regardless of whether you agree with the presence of an employer alternate, and had no right to shut down the meeting last Thursday. You are free to grieve or take another recourse later but you must still perform the work you are released and paid to perform. This is the basic principle of "work now, grieve later" and it applies to all employees, including health and safety committee members.**

Julie-Anne Lambert informs me that she will probably be unable to attend a PC meeting on any two consecutive days in the near future and will have to send an alternate on at least one day. I understand that earlier today you advised Isabelle Jourdain in an email that you will reschedule the PC meeting on a without prejudice basis. **This is the appropriate approach. Failure to schedule or participate in a PC meeting because you disagree with the participation of an employer alternate will result in discipline.**

(emphasis added)

[25] The employees alleged that Mr. Anand's letter constituted a reprisal under the *Code*.

C–April 2010 Events

[26] The dates for the replacement PC meeting in April 2010, and who would attend, continued to divide Air Canada and the employees. Air Canada's comment that Ms. Lambert would not be able to attend the April PC meeting led to this March 30, 2010 email response from Ms. Paquet (Ex-6; Tab16):

Bonjour Isabelle,

As stated in my previous email sent to you on Friday March 26th, I believe the employer co-chair should be attending the meeting as per the MOA.

I will go ahead and re-schedule the meeting without the employer co-chairperson attending as we do have a lot of work to do. Our position will be documented and we will be conducting this meeting on a without prejudice basis.

We are available to conduct the meeting on April 26th and 27th.

Silvana and I will be attending. Julie will be released by the Union that week and will not attend the PC meeting.

> The three of us could attend on any of those dates: 21st 22nd [*sic*] and 23rd if you prefer.
>
> Let me know your preference,
>
> Melanie
>
> (emphasis added)

[27] Ms. Paquet's comment about Julie Pelletier's absence from the April PC meeting led to a new March 30, 2010 letter (Ex-6; Tab17) from Mr. Anand to Ms. Pelletier:

> **Julie, I have been informed that you intend to be away on a CUPE release to attend the Health and Safety Symposium. Please be advised that as of this time I have not received a request for such from the union and as a result permission is not granted to be absent from the workplace.**
>
> If I receive a proper request from the union to release you on CUPE business, I will grant it because I understand that there is not enough Policy Committee work for three employee representatives. On the other hand, if you disagree and feel that there is sufficient work for all three representatives, then you should not seek a union release.
>
> **Consistent with the June 2009 MOA, you will not be replaced if you are granted a release for union business.**
>
> (emphasis added)

[28] On April 9, 2010, Ms. Katherine Thompson, President, Air Canada Component of CUPE, responded to Mr. Anand's letter about Ms. Pelletier's release. CUPE took exception, *inter alia*, to Mr. Anand's inference that there might not be enough PC work for three employee representatives. CUPE argued that Mr. Anand's suggestion was designed to obtain an admission which might be used in other ongoing proceedings between the parties (Ex-6; Tab 18):

> ...
>
> 2. **The release request has nothing to do with the amount of "Policy Committee work" as you claim.** It has to do with the Union's interest in having well-trained representatives on Joint Health & Safety Committees including the Policy Committee. **The Union does not appreciate your efforts to manufacture evidence or coerce employee acceptance of Air Canada's views by telling Ms. Pelletier that "if you disagree and feel that there is sufficient work for all three representatives, then you should not seek a union release".**
>
> 3. **Your comment to Ms. Pelletier that "you will not be replaced if you are granted a release for Union business" is gratuitous, uncalled for and incorrect. The June 22, 2009 MOA does not speak to replacements of individuals released for Union business. The**

> **reference to "backfilling" and ad hoc releases in the MOA pertains to absences which are paid by Air Canada, such as vacations or sick leave, and overflow work performed by Committee Members outside normal working hours. The MOA does not contemplate Air Canada receiving windfalls when the Union wishes to have an employee member of a Joint Health & Safety Committee** Member engage in Union business. Nothing prevents Air Canada from agreeing to a replacement for a Policy Committee Member on Union business. Air Canada has acknowledged this interpretation of the MOA in its February 18, 2010 Response to Grievance AC-YYZ-10-20.
>
> ...
>
> (emphasis added)

[29] Ms. Thompson also advised Mr. Anand that Ms. Paquet and Ms. DeSantis were prepared to meet, as long as an alternate employee member, who would be paid by Air Canada, attended as well (Ex-6; Tab 18):

> Finally, it is our understanding that the employee members of the Policy Committee have offered a number of dates for the quarterly meeting and that they are prepared to meet on dates when Ms. Pelletier is released on Union business provided that an alternate employee member attends the meeting. **If the meeting takes place when Ms. Pelletier is released on Union business, we further expect that a Company paid release will be granted for her replacement.**
>
> (emphasis added)

[30] CUPE and Air Canada continued to have divergent views about the next PC meeting, as reflected in Ms. Paquet's April 14, 2010 email (Ex-6; Tab 19) to Ms. Jourdain:

> Bonjour Isabelle,
>
> As previously written to you, **we are available and prepared to meet with you on April 26 th and 27 th as long as you agree to an ad hoc release to replace Julie Pelletier who has requested a Union release to attend the Cabin Safety Symposium.**
>
> Alternatively, Julie, Silvana and I are available to hold the PC meeting on April 21st, 22nd and 23rd.
>
> Can you please confirm with me?
>
> Regards,
>
> Melanie
>
> (emphasis added)

[31] On April 15, 2010, Mr. Anand responded (Ex-1; Tab 20) to Ms. Thompson's April 9, 2010 letter. In addition to commenting on the process for granting union leave, Mr. Anand advised that Ms. Pelletier would not be backfilled:

> ...
>
> **A relevant consideration for a flight attendant already released from the operation for health and safety committee functions is whether the committee can spare her. That is not a question for crew scheduling, but for me, in consultation with the appropriate committee members.** Ms. Pelletier has asked to be away with the knowledge of the employee co-chair so it is clear they believe her absence won't affect the committee. The employer representatives agree. I am therefore willing to grant the release because it would not be detrimental to the committee.
>
> **However, Ms. Pelletier will not be backfilled. The June 2009 MOA could not be clearer that there will be no backfilling of employee committee representatives "absent for any reason".** This is not just about limiting how many releases Air Canada must pay for but also about limiting the number of flight attendants the company must release from their normal duties in the operation.
>
> ...
>
> (emphasis added)

[32] Moreover, Mr. Anand indicated he would be sending a warning letter to Ms. Paquet and Ms. DeSantis regarding Air Canada's expectation that they attend the next PC meeting (Ex-1; Tab 20) :

> ...
>
> In short, Air Canada will grant Julie Pelletier's union business release but will not backfill her. **Please be advised that I will be warning the other two employee representatives on the Policy Committee that they will be expected to attend the Policy Committee meeting on the originally agreed dates and cannot refuse to do so just because Ms. Pelletier may be absent at the union's request on union business.**
>
> ...
>
> (emphasis added)

[33] On April 19, 2010, Mr. Anup issued identical warning letters (Ex-1; Tabs 21–22) to Ms. Paquet and Ms. DeSantis concerning their attendance at the April PC meeting:

> **I am advised that you are available for a Policy Committee meeting on April 26 and 27 but that the employee co-chair refuses to agree to the meeting unless Air Canada backfills Julie Pelletier, who has requested a union business release.**

I am also informed that April 26 and 27 are the dates originally agreed upon for this meeting and that the employer representatives are only available on those dates.

Please be advised that, as an employee representative, you are not entitled to refuse to attend a Policy Committee meeting for which you are available just because you, Ms. Paquet or your union disagree with Air Canada's interpretation of the backfill provisions of the June 2009 MOA.

Accordingly, you are expected to attend the meeting of the Policy Committee on April 26 and 27, failing which you will be subject to discipline. If you have any concerns about the convening of the committee meeting on April 26 and 27, you may grieve later.

(emphasis added)

[34] Mr. Anup's April 19, 2010 letter constituted the second alleged reprisal in this case. The April PC meeting ultimately took place as scheduled.

D–June 2010 Events

[35] On Tuesday, June 22, 2010 (Ex-6; Tab 25), Ms. Cathie Bumbaca of CUPE requested union leave for Ms. Pelletier, pursuant to the Air Canada–CUPE collective agreement. Ms. Pelletier planned to attend a health and safety conference on June 28–30, 2010.

[36] Mr. Francois Choquette of Air Canada wrote back (Ex-6; Tab 25) 20 minutes after receiving the email advising Ms. Bumbaca of the process to follow:

...

As mentioned before any request regarding Health and Safety should be sent to the attention of Julie-Anne Lambert.

Until this is authorized by her, nothing will be changed.

...

[37] A few minutes later, CUPE forwarded the request to Ms. Lambert, who responded shortly afterward (Ex-6; Tab 26):

...

I need to review with the Policy Committee first to determine whether the work of the committee will be disrupted by releasing Julie. I will then advise Christian, her Supervisor, of the outcome.

...

[38] Various witnesses referred to email exchanges related to Ms. Pelletier's release request. For example, on June 22, 2010, Ms. Lambert asked Ms. Jourdain for a list of Ms. Pelletier's assigned tasks on the PC, which were provided that same day (Ex-6; Tab 27).

[39] On June 23, 2010, Ms. Thompson wrote to Mr. Stephen Knowles of Air Canada (Ex-6; Tab 29) with her concerns that Ms. Lambert's processing of Ms. Pelletier's leave request interfered in union affairs:

> Hello Stephen,
>
> Please see the e-mail below.
>
> **Clearly Julie-Anne does not understand the ramifications of interference with the Union in the performance of our duties. As you have much more experience in this area perhaps you can offer her some coaching?**
>
> We are seeking a release, Union paid, for Julie Pelletier to perform Union Health and Safety duties.
>
> Thanks,
>
> Katherine

(emphasis added)

[40] Mr. Knowles disagreed with Ms. Thompson's assessment of the situation and responded that same day (Ex-6; Tab 29) that Air Canada had to review all union leave requests before making its decision:

> Hello Katherine,
>
> **No coaching is necessary.**
>
> **As you know, with limited exception, CUPE does not have the right to automatic releases for union business.** It doesn't matter whether the flight attendant you'd like released is scheduled to fly or to work for a health and safety committee. In both cases, the company will decide whether to grant the request.
>
> **For a flight attendant released from the operation and paid by the company to work full-time on a health and safety committee, that means considering whether her absence would negatively affect the committee's work.** If it would not, the release will be granted. If it would, the release will be refused.

> This is a reasonable exercise of management rights and in no way interferes with the union. I trust this clarifies the company's position.
>
> Thanks, Stephen.
>
> (emphasis added)

[41] Thursday, June 24, 2010 was a statutory holiday in Quebec where Air Canada has its head office.

[42] On June 24, 2010, Ms. Pelletier asked Ms. Lambert for an update on her leave request. Ms. Lambert responded the next day and indicated she had not yet heard back from Ms. Paquet (Ex-6; Tab 31).

[43] Ms. Paquet responded (Ex-6; Tab 32) shortly thereafter on Friday, June 25, at 3:39, that Ms. Pelletier's leave request was "reasonable":

> Hello Julie-Anne,
>
> **It is the Union's position and the position of the representatives that it has selected that this release is reasonable in all the circumstances.**
>
> Melanie
>
> (emphasis added)

[44] Ms. Lambert responded a few minutes later:

> Melanie,
>
> **That is not what I'm asking. I'm asking PC chair to PC chair (not union rep) in light of the tasks Julie has to do. do [*sic*] you think she has the time to also be off to perform union functions?**
>
> Julie
>
> (emphasis added)

[45] On June 25, 2010, at 4:46 p.m., Ms. Paquet responded (Ex-6; Tab32) :

> Julie-Anne,
>
> As the union selected PC Co-Chair **it is reasonable that Julie be absent June 28,29,30th [*sic*].**
>
> Melanie
>
> (emphasis added)

[46] On Sunday, June 27, after considering Ms. Paquet's email, Ms. Lambert moved the union leave request along (Ex-6; Tab 32) :

> I. Allo Melanie,
>
> Since Julie's primary duty is to perform H&S functions, I can only assume that you agree there is no PC work that is pressing or that PC work will not be interrupted by Julie being released to perform CUPE functions. **Based on this premise, I am turning it over to Christian to determine whether to grant the release. Christian, from our point of view, there is no harm to the PC if Julie is released to perform CUPE functions.** Please note CUPE are requesting June 28-29-30.
>
> Julie
>
> (emphasis added)

[47] Ms. Pelletier, despite the delay in receiving confirmation of her union leave, was able to attend the conference. This incident constituted the third alleged reprisal.

[48] As referred to earlier, the Board's July 4, 2011 decision in *AC 599* considered three preliminary objections brought by Air Canada. One of those objections had asked the Board to dismiss parts of CUPE's complaint on the basis that a labour arbitrator could deal with them.

[49] While the Board dismissed two of Air Canada's three objections, it did accept that an arbitrator could deal with parts of the original complaint in this matter, *infra*.

[50] Air Canada argued that *AC 599* completely disposed of the third issue related to Ms. Pelletier's June, 2010 request for union leave under the collective agreement.

III–The Statutory Regime

[51] Section 135.1 of the *Code* deals generally with the obligations for Policy and Work Place Committees. The *Code* governs various issues regarding these committees such as the minimum, and equal, number of members; alternate members; Chairpersons; as well as time off work and payment entitlements for those performing safety-related duties.

[52] These are some of the key subsections in section 135.1 to which counsel made reference:

> 135.1 (1) **Subject to this section, a policy committee or a work place committee shall consist of at least two persons and at least half of the members shall be employees** who
>
> (*a*) do not exercise managerial functions; and
>
> (*b*) subject to any regulations made under subsection 135.2(1), have been selected by
>
> (i) the employees, if the employees are not represented by a trade union, or
>
> (ii) the trade union representing employees, in consultation with any employees who are not so represented.
>
> ...
>
> (6) **The employer and employees may select alternate members to serve as replacements for members selected by them who are unable to perform their functions.** Alternate members for employee members shall meet the criteria set out in paragraphs (1)(*a*) and (*b*).
>
> (7) **A committee shall have two chairpersons selected from among the committee members. One of the chairpersons shall be selected by the employee members and the other shall be selected by the employer members.**
>
> (8) The chairpersons of a committee shall jointly designate members of the committee to perform the functions of the committee under this Part as follows:
>
> (*a*) if two or more members are designated, at least half of the members shall be employee members; or
>
> (*b*) if one member is designated, the member shall be an employee member.
>
> ...
>
> (10) **The members of a committee are entitled to take the time required, during their regular working hours,**
>
> (*a*) **to attend meetings or to perform any of their other functions; and**
>
> (*b*) **for the purposes of preparation and travel, as authorized by both chairpersons of the committee.**

(11) A committee member shall be compensated by the employer for the functions described in paragraphs (10)(*a*) and (*b*), whether performed during or outside the member's regular working hours, at the member's regular rate of pay or premium rate of pay, as specified in the collective agreement or, if there is no collective agreement, in accordance with the employer's policy.

...

(emphasis added)

[53] Section 147 of the *Code* sets out Part II's prohibition on employer discipline:

147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee

(*a*) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;

(*b*) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or

(*c*) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

[54] Essentially, an employer cannot retaliate against an employee for participating in a Part II process. This participation could involve giving testimony in a proceeding or providing information related to a Part II matter. Similarly, it could encompass acting in accordance with, or seeking the enforcement of, Part II. For ease of reference, we will refer to these various section 147 participatory actions as a "Part II Process".

[55] An employee may file a complaint with the Board about an alleged violation of section 147:

133. (1) **An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.**

(2) The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.

(3) A complaint in respect of the exercise of a right under section 128 or 129 may not be made under this section unless the employee has complied with subsection 128(6) or a health and safety officer has been notified under subsection 128(13), as the case may be, in relation to the matter that is the subject-matter of the complaint.

(4) Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.

(5) On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.

(6) **A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.**

(emphasis added)

[56] Section 133(6) reverses the burden of proof onto the employer if an employee has validly exercised his/her right to refuse unsafe work under section 128. In all other scenarios, the complainant bears the burden of proof. *Anderson* v. *IMTT - Québec Inc.*, 2013 FCA 90.

[57] There was no suggestion that Ms. Paquet, Ms. Pelletier or Ms. DeSantis refused to work due to danger under section 128 of the *Code*. Since there was no work refusal in this case, the complainants bore the burden of demonstrating that Air Canada's actions constituted a retaliation for their participation in a Part II Process.

[58] In *Rathgeber*, 2010 CIRB 536, the Board commented on its role in Part II complaints:

[21] Under Part II of the *Code*, the Board adjudicates complaints alleging that an employer has taken disciplinary or other action against employees for allegedly exercising their rights under the *Code*.

[22] Sections 133, 134 and 147 establish the regime. The Board examines whether a reprisal took place in much the same way as it handles unfair labour practice complaints under Part I of the *Code*:

[text of section 133, 134 and 147 omitted]

[23] The text of section 147, and its heading "Disciplinary Action", confirm the conditions underlying the Board's regime. There must be some form of disciplinary action or retaliation.

[24] In *Tony Aker*, 2009 CIRB 474, the Board described its current Part II jurisdiction and how it applies to two distinct areas. Firstly, the Board examines whether a reprisal took place as a result of a complainant's exercise of the right to refuse unsafe work under section 128 of the *Code*. Section 133(6) of the *Code* creates a reverse onus provision in this specific reprisal situation.

[25] Secondly, the Board also examines alleged reprisals under Part II for other situations described in section 147 which do not involve the right to refuse unsafe work. However, there is no reverse onus provision for this general protection against reprisals.

[26] In *Air Canada*, 2007 CIRB 394, the Board dealt with a complaint concerning the operation of Health and Safety Committees and explained the limits of its jurisdiction:

> [59] **Part II of the *Code* does not give the Board any jurisdiction over either the administration or enforcement of any of the provisions relating to the operation of health and safety committees.** The present wording of Part II does not give this Board jurisdiction to address the myriad of matters relating to the administration and operation of these committees, that are found in both unionized and non-unionized workplaces. Part II does not give the Board jurisdiction, for example, to determine the amount of training, the level of resources, or the amount of time away from their regular duties that should be provided to committee members at the hundreds, if not thousands, of workplaces falling under federal jurisdiction. **Similarly, it does not give this Board jurisdiction to set the regular rate of pay of employees who perform health and safety work.**
>
> [60] **The only jurisdiction the Board has under Part II of the *Code* is to hear complaints alleging that an employer has punished an employee for exercising the rights spelled out in section 147 of the *Code*.** ...
>
> (emphasis added)

[27] In *George Court*, 2010 CIRB 498, the Board compared its jurisdiction with that of a Health and Safety Officer:

> [79] In *Tony Aker*, 2009 CIRB 474, the Board analyzed how a single incident could produce complaints in different fora. In *Tony Aker*, *supra*, an employee's termination resulted in a reprisal complaint to the Board, a complaint of a Part II contravention to a Safety Officer and an unjust dismissal complaint under Part III of the *Code*.
>
> [80] The Board's jurisdiction under Part II is limited to reprisals: see sections 133 and 147. The *Code* grants a Safety Officer the general authority to investigate contraventions of all other provisions of Part II of the *Code* and issue remedial directives: see, *inter alia*, sections 127.1 and 145(1).

(emphasis in original)

[59] In summary, the Board is not tasked with the enforcement or interpretation of most of the provisions of Part II. Allegations of non-compliance or contraventions fall to a Health and Safety Officer (HSO), if the parties themselves are unable to resolve them. Similarly, the Board does not resolve collective agreement disputes, even if they relate to Part II health and safety issues. The *Code* instead mandates the Board to consider if an employer imposed or threatened discipline, including a dismissal, because an employee participated in a Part II Process, as defined earlier.

[60] This interplay of sections 147 and 133 gives rise to a three-step analysis. Each step must be passed successfully in order for the Board to find a *Code* violation.

1. Did Air Canada impose, or threaten to impose, discipline?
2. Were the employees participating in a Part II Process?
3. Did a nexus exist between the Part II Process and Air Canada's discipline?

IV–Analysis and Decision

A–Air Canada and CUPE Positions

[61] Air Canada and CUPE asked the Board to draw opposite conclusions based on the facts.

[62] In CUPE's view, the March–April 2010 disciplinary letters were designed to compel the PC's employee members to agree with Air Canada's interpretation of the *Code*. For example, CUPE alleged that the *Code* guaranteed equal numbers of employer and employee PC members. When the employees asserted this right by contesting Air Canada's use of alternates, CUPE argued Air Canada retaliated by issuing discipline letters.

[63] For Ms. Pelletier's union leave request, CUPE argued Ms. Pelletier was exercising her *Code* rights by participating as an employee member on the PC. CUPE suggested Air Canada's delay in granting her June 2010 union leave request under the collective agreement was a thinly disguised reprisal for the exercise of her Part II rights.

[64] CUPE suggested that the MOA had little relevance to this case. Moreover, even if it was relevant, Air Canada was under the misguided impression that they could contract out of the *Code*. CUPE argued this case concerned *Code* rights, rather than any rights arising under the MOA.

[65] Air Canada argued that this case concerned employees who had been released on a full-time paid basis to perform PC duties. In Air Canada's view, when employees were on this type of paid release, they nonetheless remained accountable for their conduct. As a result, if employees refused to do the duties for which they were being paid, then Air Canada, as their employer, could impose discipline.

[66] In Air Canada's view, this case was simply a labour relations matter. The discipline resulted from the employees not doing the duties for which they were being paid. It did not result from any dispute over how to interpret the *Code*. For any interpretation disputes, the employees remained free to file a complaint with an HSO or a grievance under the collective agreement. In the interim, however, the "work now, grieve later" principle applied.

[67] Air Canada argued the employees' resort to a "self-help" remedy shut down the PC meeting for which the employer remained responsible. Air Canada suggested it retained its traditional authority to act if employees refused to do the work for which they were being paid.

[68] Air Canada also argued that the MOA did not contract out of the *Code*. Rather, the 11 full-time paid releases it had granted far exceeded the minimum standards in the *Code*. In exchange for granting those paid releases, Air Canada argued the parties had agreed on various issues such as backfilling and the number of alternates. In the event of a dispute, Air Canada suggested the proper recourse was to file a grievance. A refusal to hold the PC meeting was not an available option.

[69] For the June 2010 union leave issue, Air Canada argued that the Board had already decided that it would be dealt with by a labour arbitrator. Air Canada suggested the original pleadings clearly described that issue as constituting interference in a trade union, contrary to Part I of the *Code*. It was only subsequently that CUPE referred to it as a Part II issue.

[70] In the alternative, even if the issue fell under Part II, Air Canada argued that it had never disciplined Ms. Pelletier for her union leave request. Similarly, Air Canada suggested Ms. Pelletier had not exercised any Part II rights.

B–Merits

[71] There are two main issues to which the three-step analysis may be applied. Firstly, the March and April, 2010 letters to the complainants raise the issue of whether Air Canada engaged in a prohibited section 147 reprisal.

[72] Secondly, and subject to Air Canada's objection that the June, 2010 events surrounding Ms. Pelletier's leave request had already been deferred to arbitration, the question arose whether Air Canada's delay in granting union leave under the collective agreement also constituted a prohibited reprisal.

1–Air Canada's March and April, 2010 Letters

a–Did Air Canada Impose, or Threaten to Impose, Discipline?

[73] CUPE satisfied the Board that the March and April, 2010 letters constituted discipline, or a threat of discipline, within the meaning of section 147 of the *Code*. Whether the letters are characterized as "letters of expectation" or not, CUPE's members were clearly put on notice that a repeat of the March stalemate at the next PC meeting would lead to disciplinary consequences.

[74] The April, 2010 letters to Ms. Paquet and Ms. DeSantis were explicitly disciplinary, *supra*.

[75] Air Canada did not contest this characterization of the letters.

b–Were the Employees Participating in a Part II Process?

[76] CUPE similarly satisfied the Board that the March and April, 2010 events took place within the context of a Part II Process. The *Code* mandated the holding of PC meetings.

[77] The various disputes resulting from the PC meetings included, *inter alia*, the number of members on the PC, as well as the use of alternates. Both section 135.1 of the *Code*, and the MOA, dealt with these topics.

c–Did a Nexus Exist Between the Part II Process and Air Canada's Discipline?

[78] To justify a finding of the violation of the *Code*, it is not enough to show that discipline occurred within the overall context of an ongoing Part II Process. The *Code* protects employees from discipline imposed because of their participation in a Part II Process. However, if the discipline arose for other reasons, then the essential nexus will not exist.

[79] CUPE did not persuade the Board that the required nexus existed between the disciplinary letters and the employees' participation in a Part II Process.

[80] Despite suggestions to the contrary, the Board is satisfied that the MOA is essential to any consideration of this complaint. The Board cited certain extracts from the MOA, as well as from the many emails exchanged between several of the witnesses who testified, to illustrate the overriding role it played in the parties' disputes. Air Canada, CUPE, as well as the individual employee members on the PC, all made constant reference to the MOA.

[81] According to its own wording, the MOA resulted from the settlement of a grievance involving a Part II matter. Air Canada and CUPE agreed that the MOA existed in parallel with their collective agreement and that any disputes arising from it would be taken to a labour arbitrator.

[82] It was the MOA which lead to the contradictory positions about the number of employee members on the PC. CUPE took the position that two employees named to certain Work Place Committees were also members of the PC. Air Canada disputed that interpretation.

[83] The backfilling dispute, as well as the issue of alternates, similarly arose from the MOA.

[84] Air Canada believed, rightly or wrongly, that it had negotiated certain entitlements in the MOA in exchange for providing a fixed number of full-time paid releases to CUPE members.

[85] When Air Canada and the employees disputed their respective MOA entitlements, which led to an aborted PC meeting, Air Canada issued disciplinary warning letters. Whether Air Canada had the rights it claimed under the MOA is a question for a labour arbitrator, rather than for this Board.

[86] For the Board's purposes, however, the disputes which clearly arise from the MOA constitute a separate and distinct reason for Air Canada's disciplinary measures. That discipline resulted from the MOA, rather than from the employees' participation in a Part II Process, as defined earlier.

[87] The negotiation of the MOA did not give the Board an expanded Part II jurisdiction to decide MOA disputes. Indeed, CUPE and Air Canada explicitly agreed that MOA disputes would go to a labour arbitrator.

[88] Accordingly, the essential nexus between the discipline and participation in a Part II Process is missing in this case. The discipline resulted from interpretation disputes arising under the MOA rather than from a Part II Process. In the absence of this nexus, the complaint must fail.

[89] Because of this conclusion, the Board did not need to decide whether employees remained accountable to Air Canada when performing PC duties. That is an issue already being debated elsewhere.

2–Ms. Pelletier's June, 2010 Union Leave Request

a–Air Canada's Preliminary Objection

[90] Air Canada argued that the Board's application of section 98(3) in *AC' 599* fully disposed of this third issue. Section 98(3) reads:

> 98(3) The Board may refuse to determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board.

[91] *AC' 599* described the application of section 98(3) to parts of this case:

> [95] The Board has been persuaded that it can exercise its discretion under section 98(3) to have the parties submit the Part I ULP complaint to arbitration. This exercise of discretion is conditional on Air Canada agreeing to arbitrate the matter, even if a grievance has not yet been filed.
>
> [96] **The Board will hear CUPE's Part II complaint concerning retaliation. But there is a fundamental difference in the Board's view between an employee's Part II reprisal complaint and a more general labour relations dispute between an employer and a certified trade union. The Board will hear and decide whether individual employees suffered a retaliation under Part II when they received letters from Air Canada. Those employees are entitled to have CUPE argue their retaliation cases as their designate.**
>
> [97] The *Code* at section 133(4) obliges the Board to deal with these complaints.
>
> [98] **But for a Part I ULP complaint, the Board is satisfied that the parties' collective agreement, and the *Code*, provide an arbitrator with appropriate jurisdiction. That jurisdiction can also encompass allegations of anti-union animus relating to the disputed letters and the related release for union business under the collective agreement.** A grievance has already been filed for the latter issue.
>
> ...

> [101] Accordingly, the Board has been persuaded that CUPE's Part I ULP complaint, which in substance is very different from a Part II retaliation complaint, can and should be dealt with under the collective agreement.
>
> (emphasis added)

[92] The Board's decision in *AC 599*, which was based on the parties' pleadings, held that the June, 2010 union leave request issue would no longer form part of this case. In paragraph 96 of *AC 599*, the Board agreed to hear whether Air Canada's March and April, 2010 letters to the employees constituted retaliation under Part II of the *Code*.

[93] The Board further noted in paragraph 98 of *AC 599* that the collective agreement provided an arbitrator with appropriate jurisdiction to consider the issue of the release for union business.

[94] The Board's decision in *AC 599* is sufficient to dispose of this third issue.

b–Merits

[95] Evidently, whether Air Canada violated the collective agreement for Ms. Pelletier's union leave request falls squarely within a labour arbitrator's jurisdiction. However, even if the Board had decided to examine this third issue on the basis that an aspect of it fell within Part II, it would not have found a *Code* violation.

[96] Firstly, using the-three step analysis set out previously, the Board had trouble identifying what disciplinary action Air Canada allegedly imposed. While there was delay in processing the leave request, each side blamed the other for causing it. The evidence disclosed that there had been ongoing correspondence about the proper process Air Canada would follow when a PC member, who was already on a full-time paid release, asked for a union or other leave.

[97] CUPE argued that the processing of leave requests for PC employees had been constantly changing and that these changes constituted an attempt to punish them.

[98] Even if one assumed for the sake of argument that discipline had occurred, the Board was not convinced that Ms. Pelletier's request for union leave, albeit to attend a safety conference, constituted a participation in a Part II Process, as defined earlier.

[99] CUPE had suggested that Air Canada delayed the leave request in retaliation for Ms. Pelletier's actions as an employee member of the PC. Air Canada had argued that merely being on the PC was insufficient to satisfy that Part II Process criterion. Rather, the evidence needed to show a concrete action of some sort which allegedly triggered the reprisal.

[100] In any event, on the issue of the required nexus, the dispute arose from the application of the leave process under the Air Canada–CUPE collective agreement. The Board would have been hard pressed to find that that context constituted the required participation in a Part II Process from which the alleged discipline had to emanate.

[101] If the Board had considered this issue on the merits, CUPE would not have satisfied the Board that the delay in processing the leave request was a reprisal for Ms. Pelletier's participation in a Part II Process.

V–Conclusion

[102] The Board has considered whether five Air Canada disciplinary letters given to employee members of a Policy Committee constituted a prohibited section 147 reprisal.

[103] The Board concluded that Air Canada's actions arose from ongoing disagreements about the interpretation of a Memorandum of Agreement it had negotiated with CUPE. The evidence demonstrated that the identity and number of the CUPE members on the Policy Committee, including whether they could have alternates or be backfilled when absent, all arose from that Memorandum.

[104] The Board was not satisfied that Air Canada's actions arose because of the employees' participation in a Part II Process.

[105] The Board further concluded that its previous decision in *AC 599* had referred the June 2010 union leave issue to arbitration. Even if the Board had considered it as part of this Part II complaint, it would have found that the delay in granting that union leave did not constitute a prohibited reprisal under Part II of the *Code*. The matter concerned instead a dispute about the parties' entitlements under their collective agreement.

[106] This decision does not suggest that CUPE or the employees have no forum before which they can raise their concerns, but the Board is not that forum.

[107] For all the above reasons, the complaint is dismissed.

Graham J. Clarke
Vice-Chairperson